

STATE OF MICHIGAN
COURT OF APPEALS

JOSHUA JEREMIAH HALL,

Plaintiff-Appellee,

v

LINDSEY RYAN PREY,

Defendant-Appellant.

UNPUBLISHED

September 11, 2003

No. 246571

Oakland Circuit Court

Family Division

LC No. 01-659363-DC

Before: Bandstra, P.J., and White and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right a judgment granting plaintiff joint physical and legal custody of the parties' minor child. We reverse and remand.

Defendant argues that the trial court clearly erred by applying an improper evidentiary cut-off date in evaluating whether a custodial environment existed. On the record before us, we must agree.

All custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *York v Morofsky*, 225 Mich App 333, 335; 571 NW2d 524 (1997). The clear legal error standard applies where the trial court errs in its choice, interpretation, or application of the existing law. *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000); see also *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). Findings of fact are reviewed pursuant to the great weight of the evidence standard. In accord with that standard, this court will sustain the trial court's factual findings unless "the evidence clearly preponderates in the opposite direction." *LaFleche, supra*, 242 Mich App 695. Discretionary rulings are reviewed for an abuse of discretion, including a trial court's determination on the issue of custody. *Id.*; *Fletcher v Fletcher*, 447 Mich 871, 880; 526 NW2d 889 (1994).

Whether an established custodial environment exists is a question of fact that the trial court must address before it makes a determination regarding the child's best interests. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). An established custodial environment is one of significant duration, both physical and psychological, in which the relationship between

the custodian and the child is marked by security, stability, and permanence. *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). MCL 722.27(1)(c) provides, in relevant part:

The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

In the present case, the court's opinion and order properly notes that it must first determine whether an established custodial environment exists. However, the opinion states only one sentence regarding the custodial environment determination:

Where, as here, the minor child resided with defendant mother for a period of only three (3) months subsequent to his birth and prior to plaintiff filing the pending custody action, this Court does not find the existence of an established custodial environment.

Thus, we can only conclude that the trial court limited its determination of an established custodial environment to the time between the child's birth in August of 2001 and plaintiff's filing of the petition in November of 2001, without considering any of the necessary factors set out in MCL 722.27(1)(c), including the child's age at the conclusion of the trial in September 2002, and the intervening circumstances. We must therefore vacate the judgment, see MCL 722.28, and remand the case for reevaluation under the proper standard and for entry of adequate factual findings, taking into account current information related to the child's custodial environment, as well as any other pertinent information that will assist the court in reaching a custody determination.¹ *Fletcher, supra*, 447 Mich 889.

Reversed and remanded. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Pat M. Donofrio

¹ We reject defendant's contention that this Court should, on de novo review of the record, determine whether an established custodial environment existed. In *Fletcher, supra*, 447 Mich 882, the Michigan Supreme Court made clear that review of custody orders is not de novo. Rather, custody cases must be reviewed in accordance with section 8 of the Child Custody Act. *Fletcher, supra* at 876. The failure to apply the law is legal error. *Id.* at 881. Upon a finding of error, this Court is required to remand to the trial court unless the error is harmless. *Id.* at 882. The error is not harmless because the existence of a custodial environment directly affects the burden of proof to be applied in awarding custody.